

COMMENTS ON PUBLIC RECORDS ACT- MODEL RULES Chapter 44-14 WAC

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These comments represent the thoughts and comments of one Deputy Prosecuting Attorney ("DPA") employed by a small county (Jefferson-26,000 residents). They do not represent any official position of either the County Commission or the Prosecuting Attorney's Office.

They do, however, represent the comments of a local government employee who works at least twice or three times a week with issues and questions arising from public records requests made by citizens and thus these comments come from experience rather than from an academic or pedagogic position.

My comments are below:

CCTN # 62156

Date Assigned 12/28/05

Assignee: Greg Overstreet

cc:

WAC Number	Brief Description	Comment
44-14-00003	Model rules not binding	While it is excellent that the WAC expressly state that these model rules are non-binding and not mandatory, the positive effect of such a statement is immediately diminished by the next sentence which states the model rules should be "carefully considered" by requesters and agencies. That suggests a court would look at them for guidance if faced with a dispute regarding the meaning of the Public Records Act, or "PRA." Thus, they might be equated to a "standard of care" for PRA responses.
44-14-00004	Recodification of the act at Ch. 42.56 RCW	Good idea.
44-14-00005	Training is critical	<ul style="list-style-type: none"> • While training is a good idea any time spent local government employees ("LGE") spend training has a cost to the local governments or "LG." • Can the AGO offer free training? • Can this comment be changed to state that "training, to the extent feasible and practicable, should be given to all LGE?"
44-14-010	Authority/purpose	Because these model rules state that they serve to "establish expectations," they likely do equate to a standard of care for how the LG should respond to a

		PRA request. Instead of the phrase “establish expectations,” insert the phrase “offer assistance,” so that the model rules are not perceived as the minimum a LG must satisfy.
44-14-01002	LG must have reasonable regulations in place re: PRA	Vague. Is this requirement grounds for a separate cause of action (“no regulations”) although there are no PRA requests outstanding? Worrisome to this DPA.
44-14-01002	Local codes can provide for relief if requester is disruptive.	Does this help the LG? Huge volume of requests from a polite person is greater burden on LG than rude requester with limited requests.
44-14-020	Appoint Public Records Officer= “PRO”	<ul style="list-style-type: none"> • Recommending to requesters that all requests go to the PRO may mean extra steps if it is other depts. that have the requested documents. Change this to “may” or something less synonymous w/ must. • In §2 PRO “will oversee” compliance even if another LGE processes the request. Does this mean the PRO is the person liable if a different department d/n cooperate? • Seems to make the PRO a “guarantor” that every possible step to obtain the requested items has been made. Change this. • LG from small counties presumably d/n want that burden on their PRO, who will be doing all her/his other jobs too. • Publishing the name and contact info of the PRO in a way reasonably calculated to inform the public is a positive idea.
44-14-02002	PRO-LG not required to hire a new LGE to be PRO.	LG glad to know they are not required to hire a new person to serve as their PRO . PRO,
44-14-030	Requests “should” be in writing.	Section that states the LG will memorialize an oral request into writing is an excellent idea. Change “should make the request in writing” to “is strongly encouraged to make the request in writing.” WAC 44-14-03005 points out that verbal requests for records are problematic.
44-14-03001(3)	Home computers as source of public records	Positive idea to point out that the hard drive on the home PC is not subject to search but documents made for public purposes are.
44-14-03003	Explore feasibility of electronic indexing and retrieval	<ul style="list-style-type: none"> • Word processing programs already make retrieval based on “Find” functions feasible. • Does a county that has opted out of indexing now have an obligation to investigate electronic indexing? Make it clear that the “opt out” choice

		is not being undercut or eliminated because it is not acceptable procedure.
44-14-03005	Retention of records	<ul style="list-style-type: none"> • This section fails to address questions we have had in this county about how long we are required to retain PC hard drives that might contain documents that fall within the category of documents requested by requester. • Statement in 2nd ¶ that LG are prohibited from “automatically deleting all e-mails after a short period of time,” equates with a standard of care, and these rules, we are promised, do not create and should not create a standard of care.
44-14-03006	Public Records request form and the info the requester should supply	Excellent idea to encourage the LG to create a form where the requester is asked to supply an e-mail address as this county is receiving PRA requests via e-mail and often fulfilling them that way too.
44-14-040(1)	Processing of public record requests, includes LGE providing “fullest assistance” to requester.	<ul style="list-style-type: none"> • Ambiguity of phrase “fullest assistance” is worrisome. • Does “fullest assistance” require the county to either A) provide a work station w/ PC for the requester or B) provide data in an electronic format convenient for the requester RATHER THAN the electronic format it was created in? Both those situations have arisen in this County. • Obligations or standards county must satisfy regarding the phrase “fullest assistance” need to be further clarified. • Some of these concerns are relieved when I read the proposed WAC 44-14-050.
44-14-040(6)(a)	Provide space to inspect public records	Space is at a premium in this county. Should state “shall provide, to the extent feasible, space to inspect public records.”
44-14-040(6)(b)	Records requested but not retrieved in 30 days equals a closed PRA request.	Excellent addition to the rules.
44-14-040(8)	Large requests can be done in installments.	Excellent addition to the rules.
44-14-040(10)	LG must explain why later found documents were found later	LG will not look favorably on this section. DELETE. Being forced to explain in writing why documents were late only invites a lawsuit for the delay between when they “should” have been found and when they were found. What if the reason for the delay is entirely innocent, under this standard the requester would still be able to get daily damages. This section amounts to imposing <u>strict liability</u> on the LG for

		later found documents and then ALSO makes the LG put into writing an "admission against interest."
44-14-04002	Definition what is an "identifiable record"	Excellent item. Will be helpful to both sides.
44-14-04003(2)	Fullest assistance required	This section highlights that "fullest assistance" has a constraint upon it, that the assistance cannot cause "excessive interference" with the [LGE's] other essential functions." This is where the friction occurs.
44-14-04003(5)	Reasonable estimate of time needed to fulfill request.	May create another standard of care for the LG when it states that each PRA request needs a separate analysis of time it will take to respond and that boilerplate "we need 30 days" letters will not suffice. Better result would be to have this section simply state "the LG should be prepared to explain why it requested the additional number of days it did."
44-14-04003(10)	Notice to third parties	Again creates a specific standard of care for LG because it states "the standard notice is 10 days." Why impose this rule on the LG?
44-14-05004(1)	Cover letter to requester w/ requested documents.	States an agency should provide a cover letter to the requester when transmitting the requested documents. Again, why impose this rule on the LG?
44-14-05004(2)	How LG provide access to the documents	Excellent idea to allow LG to direct requester to the web site so requester can find it themselves. Bad idea to open the possibility that LG may consider providing a computer terminal to a requester. There are no resources in this county to provide such a site but it has been requested.
44-14-05004(4)(a)	When LG d/n have the record	Excellent discussion stating that there can not be continuous or rolling requests, i.e., that documents dated subsequent to the date of a PRA request are not subject to that particular request. Very important.
44-14-04005(2)	LG can have LGE observe the inspection of documents	This is a good provision and am glad to see its inclusion, although I doubt many LG have the resources to devote a LGE to "inspection watching."
44-14-04006(1)	Closing a PRA request and letter to close	Excellent idea to list the six ways that a PRA request can be closed out. An unclear request has to be "objectively unclear" and not clarified in order to rise to level of closed out. "Objectively unclear" is an ambiguous phrase that could be problematic for LG.
44-14-050(3)(a)	Processing of PRA requests for electronic records	Excellent list of what the LG is NOT required to do, including create new records, alter a data base to conform to a requester's search criteria, produce a record in a manner it is not normally retained, write code for a requester, return to electronic format data

		not currently in that status or provide proprietary software it d/n own to the requester.
44-14-050(3) §(c) thru (f)	LG can customize access to records	Seems to strike the appropriate balance between the scope of the request and the burden it would place on the staff of the LG and allows the LG to publish a pricing schedule that includes materials and labor. Excellent section.
44-14-05001(2)	Access to electronic records	Excellent language included here that states “an agency is not required to provide an electronic copy of the data base when one or more fields are exempt from disclosure but cannot be electronically redacted or where electronic redaction would involve undue expense.” This is a boon to LG. Also states that a LG need not provide customized access if to do so would violate a software license. If customized access is provided, then requester can be forced to pay for the staff time involved.
44-14-06002(1)	Summary of exemptions	Discussion about distinction between confidential (can never be released) and exempt (can be released at discretion of LG) should be retained in these rules.
44-14-06002(2)	Privacy exemption d/n exist	Good to have this clarified.
44-14-06002(4)	Deliberative process exemption	Well-explained here.
44-14-070(1)	Costs of providing copies	Now LG can request deposit of 10% before starting to make copies. Excellent addition to the RCW.
44-14-07001(5)	Charging for copies, use of outside vendor	This county uses outside vendors for large requests or requests that include maps, photos, etc. So it is excellent to have express permission to do so.
44-14-080	Review of denial of public records done inside the county and not in Superior Court	<ul style="list-style-type: none"> • This provision is UNWORKABLE for LG. • The spirit of RCW 42.17.320 requiring prompt possible review of denial decisions can be met w/o creating the cumbersome method suggested here. • In small counties the role of PRO will be one of many job duties for someone who already has a full load of job duties. • The PRO may well have made the denial decision. • Yet the PRO then has to accept a request for review of that same denial (the one he or she issued!) and send it on to his/her supervisor for the supervisor’s review, involving two LGE in this review process when LG resources are quite scarce and getting scarcer. • The supervisor intentionally made the PRO the

		<p>person who decides questions involving PRA requests and delegated that task to him, but with this system the supervisor has to come up to speed on the PRA and understand its intricacies in order to make a decision on the “request for review of the denial.”</p> <ul style="list-style-type: none"> • Must supervisor’s decision be in writing? • The PRO has to provide due process for the person requesting review of the denial, does this include the right to provide legal arguments as to why the denial was improper? • Does the PRO have to provide a full hearing and tape record that hearing? • What if the supervisor is unable to decide in 2 days because he or she is on vacation, does that create more due process violations? • If there are due process violations during this in-house review process, then how does one so aggrieved seek vindication? In Superior Court, or with the supervisor’s supervisor? • That is why the appeal process is better suited for Superior Court, where the rules and the mechanisms (e.g., tools for recording the proceedings) are already in place.
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While these proposed model rules do a good job of bringing the PRA into the electronic age, I am worried that they will become the floor, i.e., the bare minimum that a local government must comply with. There are many statements in there that lend themselves to a Judge seeing them as “best practices” or “minimum practices.”

The in-house review process is overly bureaucratic and not needed and is likely to be used frequently by requesters since the proposed model rule states that the requester MAY request internal review of the denial.

Some of these proposed model rules impose extra costs (dare I say “unfunded mandates”) on the local governments and that is another reason supporting the changes I have proposed.

Thank you for considering my statements, which are NOT the official position of Jefferson County.

David Alvarez (360) 385-9219, 4787 Magnolia Street, Port Townsend, WA 98368
alvarez@olympus.net

